

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 232 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

GUJARAT AMBUJA EXPORTS LTD.,

Versus

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Appearance:

Mr. Saurabh Soparkar, Senior counsel for
MRS SWATI SOPARKAR for the Petitioner.
MS PJ DAVAWALA for the Respondent.

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision:19.2.2003

CAV JUDGEMENT

The present petition is filed under section
391(2) of the Companies Act, 1956 (hereinafter referred

to as "The Act") seeking sanction of the Scheme of Compromise and/or arrangement between the petitioner and two different classes of its shareholders. The historical background and objectives and need for such scheme have been narrated in para 9 of the petition and read as under:

1.1. Gujarat Ambuja Exports Limited is a listed public limited company. It is engaged in the business of manufacturing and export of various Agro processed commodities. It is engaged in the manufacturing of 100% Cotton Yarn from Cotton, Starch, Liquid Glucose, Dextrose Monohydrate Powder, Malto Dextrin Powder and other products from Maize, De-oiled Cakes/Extraction and Edible Oil from various Oil Seeds, Wheat Flour and other products from Wheat and various other commodities. It is also engaged in the activities of Merchant Exports and it has the major presence in the International market for its products. The company has a turnover of Rs. 524.43 crores and profits of Rs. 4.40 crores and the reserve of more than 166 crores during the financial year ended on 31.3.2002. Substantial contribution in the turnover is due to the exports which is around 50% of the total turnover of the company. Due to the presence of the company in highly volatile Agro Commodities and Agro Processing Business the company has been able to give the dividend at the rate of only 5% per annum in the last two years.

1.2. The applicant company has more than 2,80,000 shareholders where average holding per share of these shareholders is around 67 shares. The cost of services of these shareholders is around Rs. 30/- per folio and goes on increasing every year. The applicant company's equity shares are tradable under the compulsory dematerialised form and therefore, the shareholders who hold on an average negligible shares are put to lot of difficulties and inconvenience as well as the costs in relation to conversion of their physical holding into dematerialised holding as well as holding cost which is being charged by various depository participants. The market value of the shares of the applicant company held by these shareholders is many a times less than even the annual cost. Due to this prohibitive cost, large number of shareholders have not got their shares dematerialised and still hold them in physical form. This deprives them to trade in the Stock Exchange and even if traded would fetch very negligible amount because of discounted rate offered in case of physical shares. Taking into consideration all these factors the shareholders of the applicant company are not able to even encash the present

market value of the shares. Further considering the profitability, the company has been declaring dividends in the range of 5% to 6% per annum in the last few years. However, because of very low holdings per folio, the shareholders situated in the remote area have not been able to even encash the dividends. The company, therefore, intends to reduce the wide base of its equity share capital in order to be cost effective and pay back to the small shareholders their investments at reasonable price. The present scheme therefore is for the mutual benefit of the company and its shareholders.

1.3. In these above circumstances, the applicant company has proposed a scheme of arrangement for reduction of capital by paying back the existing small shareholders holding upto 99 equity shares per folio in physical form and extinguishing the same. This will provide an exit route for those shareholders who would like to get the benefit of getting something better than the general market value of their investments without going into the administrative hassle of getting their physical shares dematerialised and also getting better market value than the existing average market rate prevalent for the equity shares of the applicant company. The applicant company has offered to purchase the shares at par as against the average market price of last six months being Rs. 8.40 per share.

1.4. Accordingly, the Board of Directors of the applicant company resolved that subject to such approvals of the shareholders, secured creditors and unsecured creditors of the company and subject to such sanctions of the appropriate courts, as may be required in law, and subject to such consents and permissions of the Central Government and other authorities as may be necessary, the scheme of arrangement be made between the applicant company and the equity shareholders of the company on the broad basis referred to in the Scheme of Arrangement.

2. Earlier the petitioner had moved an application seeking direction for convening the meetings of its shareholders and creditors for considering and if thought fit, approving the Scheme of Compromise. The learned Single Judge of this Court, however, rejected the said application. Against the said order the petitioner preferred an appeal being O.J.Appeal no. 26 of 2002 and the Division Bench of this Court vide its order dated 21.9.2002 permitted the petitioner to convene the different meetings of its shareholders and creditors for the purpose of considering, and if thought fit approving

the said Scheme of Compromise.

3. Pursuant to the court's order dated 21.9.2002 for convening meeting, the notices of the meetings were also advertised as directed by the said order in "The Times of India-English daily(Ahmedabad, Mumbai, Delhi, Bangalore, Calcutta, Lucknow, Hyderabad and Pune editions), Economic Times (Chennai edition) and Sandesh Gujarati daily, Ahmedabad of 26.10.2002.

4. On 21.11.2003, the said meetings of the Eligible and other Equity shareholders, Secured and Unsecured Creditors of the Company were duly convened in accordance with the said order and Shri Vijaykumar D.Gupta acted as the Chairman of the same. Said Shri Vijaykumar D.Gupta has reported the results of the meetings to this Hon'ble Court vide the affidavit dated 26.11.2002.

5. The said meeting of the Eligible Equity Shareholders of the company was attended by 1732 members in person and through proxies and the total value of their shares if Rs. 8,55,950/- being 85,595 shares of Rs. 10/- each. Said scheme of Arrangement and Restructure was taken as read at the request of the shareholders present at the meeting. The detailed discussions and deliberations were made on the proposed scheme. The poll was taken to ascertain the wishes of the Equity shareholders which showed the following result.

1704(One thousand Seven hundred and four) equity shareholders present in person or through proxy in the meeting representing the value of Rs. 8,51,240/voted in favour of the proposed resolution.

Whereas 4(four) equity share holders present in person or through proxy in the meeting representing the value of Rs. 1,470/- voted against the proposed resolution.

Thus, the resolution approving the scheme of arrangement was carried by 99.76% of the members present and 99.83% in value which is much more than the statutory requisite majority and it was resolved as follows:

"Resolved that the compromise or arrangement in the nature of the Scheme of Arrangement between Gujarat Ambuja Exports Limited and its Equity shareholders sent alongwith the notice dated 10th October, 2002 for convening this meeting, be and is hereby approved."

6. The said meeting of the Other Equity shareholders of the company was attended by 53 members in person and through proxies and the total value of their shares is Rs.12,00,92,600/- being 1,20,09,260 shares of Rs. 10/- each. Said Scheme of Arrangement and Restructure was taken as read at the request of the shareholders present at the meeting. The detailed discussions and deliberations were made on the proposed scheme. The poll was taken to ascertain the wishes of the Equity shareholders which showed the following result.

51(Fiftyone) equity shareholders present in person or through proxy in the meeting representing the value of Rs. 12,00,92,140/- voted in favour of the proposed resolution.

Whereas the ballot used by 2(two) equity shareholders present in person or through proxy in the meeting representing the value of Rs. 460/- were found to be invalid.

Thus, the resolution approving the scheme of arrangement was carried unanimously by the members present and voting and it was resolved as follows:

"Resolved that the compromise or arrangement in the nature of the Scheme of Arrangement between Gujarat Ambuja Exports Limited and its equity shareholders sent alongwith the notice dated 10th October, 2002 for convening this meeting, be and is hereby approved."

7. The said meeting of the Secured Creditors of the Company was attended by 02(two) secured creditors in person and through proxies and the total value of their debts is Rs. 92,11,38,109.97. Said scheme of Arrangement was taken as read with the permission of all the creditors present at the meeting. The detailed discussions and deliberations were made on the proposed scheme. The poll was taken to ascertain the wishes of the Secured creditors which showed the following result.

Both the Secured Creditors present in person representing the value of Rs. 92,11,38,109.97 voted in favour of the proposed resolution. Whereas none of the secured creditors present at the meeting voted against the proposed resolution. Hence, the resolution approving the scheme of arrangement was carried unanimously and it was resolved as follows:

"Resolved that the compromise or arrangement in the

nature of the Scheme of Arrangement between Gujarat Ambuja Exports Limited and its Equity Shareholders and Secured Creditors of the company sent alongwith the notice dated 10th October, 2002 for convening this meeting, be and is hereby approved."

8. The said meeting of the Unsecured Creditors of the Company was attended by 29(twenty-nine) unsecured creditors in person and through proxies and the total value of their debts is Rs. 10,55,71,993.83. Said Scheme of Arrangement was taken as read with the permission of all the creditors present at the meeting. The detailed discussions and deliberations were made on the proposed scheme. The poll was taken to ascertain the wishes of the Unsecured creditors which showed the following result.

Unsecured Creditors present in person or proxy representing value of Rs. 10,55,71,993.83 ps. voted in favour of the proposed resolution. Whereas none of the unsecured creditors present at the meeting voted against the proposed resolution. Hence, the resolution approving the scheme of arrangement was carried unanimously and it was resolved as follows:

"Resolved that the compromise or arrangement in the nature of the Scheme of Arrangement between Gujarat Ambuja Exports Limited and its equity shareholders and Unsecured Creditors of the company sent alongwith the notice dated 10th October, 2002 for convening this meeting, be and is hereby approved."

9. The outcome of the Option forms sent to all the eligible equity shareholders for exercising the option for the willingness to continue their shareholding or opt for the repayment as proposed is attached as exhibit "F". In light of the amounts arrived at considering the response of the shareholders, the total amount of the Share capital that will be reduced, on the scheme being effective, comes to Rs. 6,21,70,840/-. The Special Resolution passed at the General meeting of the company for this purpose as referred earlier is also attached as Exhibit "D".

10. Pursuant to the court's order, the petitioner convened different meetings on 21st November, 2002 as is pointed out above. The said scheme has been approved by more than 99% of the eligible shareholders. So far as the meetings of other shareholders, unsecured creditors and secured creditors are concerned, they have approved the said scheme unanimously in their respective

meetings. In view of this, the scheme has been approved by the requisite statutory majority in different meetings. After the present petition was filed on 10.12.2002, the same was admitted and notice of hearing was ordered to be published in newspapers. The same has been done and an affidavit to that effect has already been filed before this Court. Notice of the petition has also been served upon the Central Government and Ms. P.J.Davawala, the Additional Central Government Standing Counsel has appeared on its behalf.

11. The petition was taken up for hearing and final disposal before this Court. At that time, Mr. S.N.Soparkar, Senior Advocate appearing on behalf of the petitioner submitted that considering the facts and circumstances of the case the petition is required to be allowed and the scheme deserves to be sanctioned. For this purpose, he firstly relied upon the judgment of Supreme Court of India in the case of Miheer H. Mafatlal vs. Mafatlal Industries Ltd. (AIR 1997 SC, 506), wherein the Supreme Court of India has laid down following principles to be considered while approving the Scheme of Compromise under section 391 of the Act.

"(1) The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by section 391(1)(A) have been held.

(2) That the scheme put up for sanction of the court is backed up by the requisite majority vote as required by section 391(2).

(3) That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question. That the majority decision of the concerned class of voters if just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

(4) That all necessary material indicated by section 391(1)(a) is placed before the voters at the concerned meetings as contemplated by section 391(1).

(5) That all the requisite material contemplated by the proviso to sub-section (2) of section 391 of the Act is placed before the court by the

concerned applicant seeking sanction for such a scheme and the court gets satisfied about the same.

(6) That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the scheme with a view to be satisfied on this aspect, the court, if necessary, can pierce and veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.

(7) That the company could has also to satisfy itself that members or class of members or creditors or class of creditors, as the cas may be, were acting bonafide and in good faith and were not coercing the minority in order to promise any interest adverse to that of the latter comprising the same class whom they purported to represent.

(8) That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial of the class represented by them for whom the scheme is meant.

(9) Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the court are found to have been met, the court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class or person who with their open eyes have given their approval to the scheme even if the view of the court there could be a better scheme for the company and its members or creditors for whom the scheme on that grounds it would otherwise amount to the court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction".

12. He also pointed out that pursuant to the published advertisement only two shareholders have lodged their objections which are not of any significant value. He also referred to the observations made by the Central Government in the letter dated 13.1.2003 addressed by the Regional Director, Department of Company Affairs to the Registrar of Companies, Gujarat, Ahmedabad and submitted that the observations have no substance in law. However, Ms. Davawala referred to this observation and submitted that the same are required to be taken into consideration

while considering the sanction of the Scheme.

13. Having heard the learned counsel appearing the parties, in my view the scheme requires to be sanctioned. As is pointed out by the Supreme Court in the case of Miheer Mafatlal (Supra) this court, while sanctioning the scheme does not sit in appeal over the commercial wisdom of majority of the class of persons who with their open eyes have given their approval to the scheme and this court cannot refuse the scheme on the ground that the better scheme for the benefit of the members or creditors could have been formed.

14. In light of the limited role which the court has to perform at this stage, I propose to consider the objections of two shareholders as also the observations of the Central Government.

15. Pursuant to the published advertisement petitions have been filed by one Smt. Ratna Sainathan as also by one Smt. Manjurani Agrawal. Broadly stated, according to them, the proposed scheme is not fair and that the shareholders should be given better offer. The petitioner has adequately dealt with these objections by filing affidavit on 8.1.2003 and in particular, it is pointed that the scheme is not mandatory at all-if any one does not want his share to be bought over, he was required to indicate to the company his choice of continuing with the company as its shareholder and in that case notwithstanding the scheme he would be continued to be shareholder having the identical rights to which he is entitled today. In other words, the scheme is optional and those who do not want to take the benefit may as well decline to take the same. In that view of the matter, in my view, these objections have no merits. There was nothing which compelled the objectors to offer their shares for purchase and if the objectors wanted to continue as shareholders, they should have chosen the same. In that matter, in my view, these objections are illegal and accordingly the same are rejected.

Ms. Davawala has placed on record a letter dated 13.1.2003 which contains certain observations of the Central Government. For the sake of clarity, the same are reproduced hereunder:

"With reference to the above, I have to state that the petition in respect of scheme of arrangement of the above company have been examined. It is seen that the scheme involves buy back of shares for which the company should

have adopted the procedure laid down under section 77A of the Companies Act, 1956. The option in Form A given to shareholders who are eligible shareholders is that they have to sign and send the form if they wish to continue as shareholders. Those who do not exercise the option to continue as shareholders would in effect be treated as having opted to receive payment against the cancellation of shares. This involves negative option and against the interest of small shareholders and as such the above matter may be brought to the notice of the Hon'ble Court at the time of hearing."

16. At the outset, it may be noted that according to the communication contained in the letter these are not the objections of the Central Government at all. As a matter of fact, according to this letter the Central Government does not object to the scheme but has only required this Court to notice the facts stated above.

17. Two aspects are highlighted by the Central Government which are dealt with hereinafter.

According to the Central Government, the scheme involves buy back of shares for which the petitioner should have adopted the procedure laid down under section 77A of the Act.

At the outset, it may be noted that Ms. Davawala, the learned Additional Standing Counsel for the Central Government read out the objection of the Central Government and contended that in the absence of giving reply to the company for opting to continue as shareholder, the company should not have presumed that the shareholder is ready to buy back of his share, but in case no reply is sent by the shareholder, it should be presumed that the shareholder is ready to continue as a shareholder. Negative option should be treated as ready to continue as a shareholder. Mr. Soparkar, learned Senior Advocate appearing for the petitioner company submitted that these observation in the letter and her contentions are legally unsustainable. It was pointed out that such a scheme cannot be framed under section 77A because section 77A envisages buy back of shares from all the present shareholders on a proportionate basis. In other words, every shareholder has to be offered buy back on proportionate basis. It was submitted before me that in the present scheme the only "Eligible shareholders" are offered the scheme. The eligible shareholders, in brief, are who hold less than 100 shares in physical form

are not required to spend money for the purpose of getting their shares in DEMAT form at a cost and should not suffer loss when they sell the shares on stock market because they would not realise the full market price. It was pointed out that such a scheme cannot be covered under section 77-A of the Act. This is nothing but a compromise and an arrangement between the petitioner and its two classes of its shareholders, which would fall squarely under section 391 of the Act. For this purpose, he relied upon the decision of Division Bench Judgment of the Bombay High Court dated 15.7.2002 in the case of Securities and Exchange Board of India vs. Sterlite Industries (India) Ltd. in Appeal Lodging no. 520 of 2002 in Company Petition No. 203 of 2002 in Company Application No. 18 of 2002. The relevant portion reads as under:

"The submission of the appellant that the non-obstante clause in section 77A gives precedence to that section over the provisions of sections 100-104, section 391 is misconceived. The non-obstante clause in section 77A namely "Notwithstanding anything contained in this Act.." only mean that notwithstanding the provisions of section 77 and sections 100-104, the company can buy back its shares subject to compliance with the conditions mentioned in that section without approaching the court under sections 100-104 or section 391. There is nothing in the provision of section 77A to indicate that the jurisdiction of the court under section 391 or 394 has been taken away or substituted. It is well settled that the exclusion of the jurisdiction of the court should not readily be inferred, such exclusion should be explicitly or clearly implied. There is nothing in the language of section 77 that gives rise to such an inference. We are, therefore, inclined to hold that section 77A is merely an enabling provision and Court's powers under sections 100-104 and section 391 are not in any way affected. The conditions provided in section 77A are applicable only to buy back of shares effected under section 77A. The conditions applicable to sections 100-104 and section 391 cannot be imported into or made applicable to a buy-back under section 77A. Similarly, the conditions for a buy-back under section 77A cannot be applied to a scheme under section 100-104 and section 391. The two operate in independent fields.

It is not disputed before us that reduction in the capital can be effected under section 77 read with sections 100-104 and 391 even in the case of buy-back of shares. However, it is contended that the optional sale by the shareholders would not amount to arrangement or reorganisation of the capital and would not therefore cover section 391 read with section 100 of the Companies Act. We are unable to accede to this contention as even in cases where capital is reduced by optional sale reduction results after the option is exercised to the extent of the shares cancelled. This is as equally a reduction of capital as in the case of compulsory cancellation of shares. We do not see any distinction between the two on the aspect of the reduction. The word "arrangement" is of wide import and is not restricted to a compulsory purchase or acquisition of shares. There is no reason as to why a cancellation of shares and the consequent reduction of capital cannot be covered by section 391 read with section 100 merely because a shareholder is given an option to cancel or to retain his shares. In view of the foregoing discussion, the objection of the appellants based on section 77A must be rejected."

Having heard the submissions of the learned counsel and having gone through the judgment of Bombay High Court in the case of Sterlite Industries (Supra). I am of the view that the observation of Central Government is without any basis. The Bombay High Court has held that the conditions applicable to sections 100 to 104 and section 391 cannot be imported into or made applicable to a buy back under section 77A and vice versa. The two operate in independent fields. In view of this, the observation of the Central Government is rejected.

According to the observation of the Central Government, the negative option contained in the scheme is against the interest of small shareholders.

18. According to Ms. Davawala, the learned Additional Standing Counsel for the Central Government, the scheme is contrary to the law inasmuch as the same is dependent upon the "Negative consent" from the shareholders. She submitted that the Central Government would not have objected to the scheme if it would have

provided that those shareholders who want to continue with the company were not required to despatch their option and that silence under the scheme, would have been regarded as the decision to continue as shareholders rather than permit the company to buy back the shares. According to her, under the Contract Act, silence cannot be regarded as consent and that unless there is assent with expressed consent from the shareholders, one cannot assume that the shareholder is agreeable to the scheme of buy back. In this connection, she drew my attention to the following two judgments.

1. The decision of Allahabad High Court in the case of Gaddar Mal vs. Tata Industrial Bank, Bombay (AIR 1927, Allahabad, 407) where the Allahabad High Court has held that silence of the offeree cannot be regarded as his consent and that assent must be express words or positive conduct and that no duty is cast by the law upon the person to whom an offer is made to reply to that offer.
2. The Decision of Rangoon High Court in the case of S.M.Bholat vs. Yokohama Specie Bank Ltd. (AIR 1941 Rangoon, 270) where also the Court has held that silence on receipt of a letter is not acceptance of the terms proposed by the same.

In view of these two judgments, according to the learned Additional Standing Counsel, the scheme is not valid because under the scheme, silence is regarded as acceptance of the scheme. She further submitted that, it is likely that some of the shareholders might not receive even notice of the meeting and therefore, sanction of the scheme without approval of the shareholders and compulsorily purchasing the shares would not be appropriate.

19. However, to a pointed query from this Court, she accepted that non receipt of notice by any shareholder is not a ground taken by the Central Government and the Central Government is not aware of such complaint.

20. In reply, Mr. Saurabh Soparkar, Senior Advocate for the petitioner company submitted that the Central Government has completely misunderstood the scheme. He pointed out, the scheme is not based on "Negative Consent" of the shareholders at all. He submitted that scheme is in 2 parts namely the scheme as proposed and the consequences of the scheme. It was

pointed that, the scheme was approved by the statutory majority at a duly convened meeting under the direction of this Court. Every shareholder had been sent notices of the scheme and the scheme was approved by passing necessary resolution at the said meeting. The scheme is approved, therefore, not by negative vote (Negative consent) but by express approval of members present and voting at the meeting.

He also drew attention to the fact that out of four meetings, three meetings approved the scheme unanimously, whereas 4th meeting approved the scheme with more than 99.5% members present and voting constituting both in numbers and in value and therefore it is not correct to state that the scheme is being sanctioned on the basis of "Negative consent".

He further submitted that once the scheme is approved, the same will have to be worked out. While working out the scheme, according to scheme itself which is approved at the meeting of shareholders, it is provided that those members do want to continue as shareholder of the company may send their option in a prepaid envelope supplied by the company in advance to every shareholder. Obviously those who do not want to continue as a shareholder would not send the option. However, sending the option is a stage which is subsequent to the passing of the resolution and it was submitted that in the meeting of the shareholders, they have decided as to how willingness of every shareholder to continue or not to continue with the company would be obtained by it. As shareholders have decided the modality of sending the option to the company, it may be held that the scheme is not based on the negative consent.

In this connection, he relied upon the judgment of Allahabad High Court in the case of Gaddarmal Hiralal and another vs. M/s. Chandrabhan Agarwal and Company (AIR 1968 Allahabad, 292) where it was held as follows:

"To put it differently, if there exists a prior agreement among the parties laying down how the transactions shall be undertaken, that agreement shall determine whether in the subsequent transactions governed by or flowing out of such agreement there was acceptance of proposal, i.e. the proposal became a promise and hence a fresh agreement enforceable independently of the earlier transaction. Further, if the agreement makes a provision for acceptance of the proposal. But if there was no prior agreement as to the

implied acceptance of the proposal by not returning the goods or papers mere no-return, i.e. omission or silence shall not signify acceptance of the proposal."

In view of the above he submitted that as the scheme is approved by almost every one at the meeting convened as per the direction of the Hon'ble Court, of which notices were sent to every shareholders and creditors of the company therefore, there was a positive consent to the scheme. Merely because the scheme provided a particular methodology for buy back, it cannot be said that it operates with the negative consent.

21. Apropos the argument of the Central Government about non receipt of notice, it was submitted by the learned Senior Advocate for the petitioner that it was not even the case of the Central Government that any shareholder has not received the notice. He further submitted that in any case, by virtue of provisions of section 53 of the Companies Act, 1956 every shareholder is deemed to have been sent the notices of the meeting and in this regard he invited my attention to the order of this Court requiring the petitioner to issue individual notices to every shareholder under certificate of posting and the publication of the same in the newspapers and also the affidavit dated 1.11.2002 filed by Mr. Vijaykumar Gupta, Chairman appointed by the Court to chair the meetings, wherein he has stated on oath that the said directions of the court have been complied with.

In view of the above, it is hence submitted that the observations of the Central Government is required to be rejected.

22. It was further submitted that in any case, in the meetings of the shareholders resolution is passed approving the whole scheme including the adopting of such methodology by shareholders holding more than 99%. If such a procedure is valid and acceptable to almost every shareholder of the company, it was submitted that the same cannot be regarded as against the interest of the small shareholders. My attention was also invited to the order passed by the Bombay High Court in the case of Jay Corp Ltd., wherein scheme of identical nature was approved by the Bombay High Court.

23. I have carefully considered the submissions. In my opinion, the observations of the Central Government has no basis. Firstly, as the letter reads, this was not an objection by the Central Government and it is merely an observation. The scheme

is approved almost unanimously in the meetings of the shareholders of a company. Such approved scheme itself provides that those shareholders who do not send letters stating their willingness to continue with their holding, are to have deemed to be agreeable for purchase of their shares. This is an arrangement between the Company and the shareholders and as pointed out by the Supreme Court of India in the case of Miheer Mafatlal (Supra) this court cannot examine the propriety of every clause of the scheme or look into the commercial wisdom of the shareholders as regards one or other commercial terms of the scheme. It is not open to this court to reject the scheme merely because according to the court some other better scheme would be possible. I also find that the scheme containing similar clause has been approved by the Bombay High Court in the case of Jay Corp Ltd.

24. As pointed out above, for the oral argument of learned counsel for Central Government as regards alleged non receipt of notice by some shareholders, there is no basis. In any case by virtue of provisions of section 53 of the Companies Act, 1956, service of the notice is deemed to have taken place at the expiry of 48 hours after the same is posted. This part of the argument, therefore, has no merits.

25. Coming to the issue as regards the negative consent, I find that the objection of the Central Government is misconceived. The petitioner has not approached this Court for getting a scheme sanctioned which is approved by the shareholders on the basis of "negative consent" at all. The petitioner had approached this Court seeking directions for convening meeting. On the basis of such directions given by this Court, necessary meetings were convened. Notices were dispatched to all the shareholders, secured and unsecured creditors. Meetings have taken place where the shareholders and the creditors were present. Out of the four meetings, three have approved the scheme unanimously, whereas at the 4th meeting the scheme was approved with more than 99.5% of the members present and voting in numbers as well as in the value. Under the circumstances, the scheme has been approved at the meetings.

26. It may be noted that the scheme provides for those shareholders who do not want to continue as shareholders to remain silent and thereby exercise its option to sell the shares and that thereupon the company would pay the amount. It is this scheme which is approved by the shareholders and shareholders have agreed

to this method in the first place by way of passing the resolution at the meetings. This is a modality for the purpose of effectuating the scheme and when the shareholders have agreed to this modality at their meetings, it cannot be said that the court is sanctioning the scheme with the negative consent.

Reliance placed by the learned Senior Advocate for the petitioner on the judgment of Allahabad High Court in the case of Gaddarmal Hiralal and another vs. M/s. Chandrabhan Agarwal and Company (Supra) is well placed inasmuch as where the negative consent follows the agreement among the parties laying down as to how the transactions shall be undertaken, the same is a valid method of expressing consent.

The reliance placed by the learned counsel for the Central Government on the decision of Allahabad High Court in the case of Gaddar Mal vs. Tata Industrial Bank Ltd. (Supra) and of Rangoon High Court in the case of S.M.Bholat vs. Yokohama Specie Bank Ltd. (Supra) is misconceived inasmuch as none of these cases deal with the negative consent followed by the prior agreement on deciding the manner of transacting.

Under the circumstances, in my view, this objection of the Central Government has no substance.

27. The issue can be examined from a different angle as under:

It is not disputed that the petitioner could have formulated a scheme for reduction of capital under sections 100-104 of the Act. If the company would have followed such a procedure and if at the meeting of the shareholders convened for reduction of share capital, resolution would have been passed whereby shares of every shareholder would have been reduced in value and if such resolution is confirmed by this court the shares of every shareholder would be compulsorily reduced on payment of consideration. In such a situation, all the shareholders would have lost a part of their shares without any exception.

28. In the present case the company has, on the contrary, given an option to those who do not want their shares to be bought back, to inform the petitioner company and those who would not inform are assumed to be agreeable to the buy back of the shares. Therefore, continuing with the company is an exception rather than rule. If the company would have achieved the purpose for

which the present petition is filed by preferring the scheme under section 100, then why similar result could not be achieved in this scheme ? As a matter of fact, this scheme is found more in the interest of shareholders inasmuch as it gives an option to the shareholders to continue or not to continue with the company. Therefore, the observation of the Central Government that the scheme is not in the interest of the small shareholders is not correct and is therefore, rejected.

29. In view of this finding, Company Petition no. 232 of 2002 is allowed and the prayers in terms of para 23(a) and 23(b) are granted. Scheme of Arrangement referred to in para 10 of the petition at Annexure "C" to the petition alongwith Annexures thereto is sanctioned so as to be binding on all Eligible and other Equity shareholders, secured creditors and unsecured creditors of the petitioner company and on the petitioner company and the petitioner company is permitted to reduce its Issued Subscribed and Paid up capital in terms of resolution dated 21.11.2002 (Annexure "D" to the petition) and draft minutes (Annexure "G" to the petition) are approved pursuant to provisions of sections 100 to 104 of the Act. The petitioner shall pay the costs of the petition to the Central Government which is quantified at Rs. 3500/-.

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